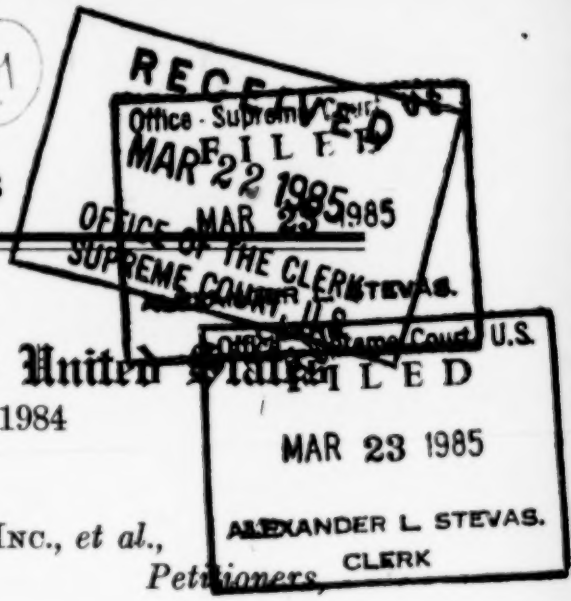

No. 84-363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., *et al.*,
Petitioners,

v.

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE CONFERENCE OF STATE BANK SUPERVISORS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Section 3(d) of the Bank Holding Company Act (the "Douglas Amendment"), which prohibits any bank holding company from acquiring a bank located in another state unless such acquisition is "specifically authorized" by the statutory law of the bank's home state, grants to each state broad authority to determine the degree to which out-of-state bank holding companies may acquire banks located within its borders.

2. Whether the Court below correctly determined that Connecticut and Massachusetts acted within the scope of authority granted by the Douglas Amendment, and therefore did not violate the Commerce Clause, when they each adopted statutes permitting an out-of-state bank holding company to acquire an in-state bank if such holding company is located in another New England state which affords reciprocal privileges to bank holding companies headquartered in the enacting state.

3. Whether the Court below correctly decided that the Connecticut and Massachusetts statutes are valid exercises of the authority granted to the states by Congress under the Douglas Amendment and therefore do not encroach upon the supremacy or structure of the federal government in violation of the Compact Clause.

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Citicorp, 71 Fed. Res. Bull. 101 (1985) 18

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Lewis v. *BT Investment Managers, Inc.*, 447 U.S. 27.. 18, 22, 25

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National Railroad Passenger Corp. v. *National Ass'n of Railroad Passengers*, 414 U.S. 453 25

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Northeast Bancorp, Inc. v. *Board of Governors of Federal Reserve System*, 740 F.2d 203 (2d Cir. 1984), *cert. granted*, 105 S.Ct. 776 (1985) 2

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Prudential Insurance Co. v. *Benjamin*, 328 U.S. 408 . 20, 21, 26

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Fla. Stat. Ann. § 658.29(3)(d) 16

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LEGISLATIVE MATERIALS:

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Control of Bank Holding Companies: Hearings on S. 880, S. 2350 and H.R. 6227 before a Subcomm. of the Senate Comm. on Banking and Currency, 84th Cong., 1st Sess. (1955) 10, 11

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102 Cong. Rec. 6855 (1956) 11

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102 Cong. Rec. 6861-62 (1956) 11, 12, 13, 23, 24

102 Cong. Rec. 6863 (1956) 13

102 Cong. Rec. 7165 (1956) 13

130 Cong. Rec. S 11153, 11162, S 11178 (daily ed. Sept. 13, 1984) 28

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S. Rep. No. 584, 72d Cong., 1st Sess. (1932) 9

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S. Rep. No. 641, 97th Cong., 2d Sess. (1982) 16

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Ginsburg, "Interstate Banking," 9 Hofstra L. Rev. 1133 (1981) 5, 8

TABLE OF AUTHORITIES continued

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Golembe, "Our Remarkable Banking System," 53 U. Va. L. Rev. 1091 (1967) 7

R. Hofstadter, *The American Political Tradition* (Vintage ed. 1974) 7

A. Schlesinger, Jr., *The Age of Jackson* (1945) 7

Sudo, "Interstate Bills Dominate State Slates in '85," Am. Banker, Dec. 28, 1984, at 1, col. 2 17

2A Sutherland, *Statutes and Statutory Construction* (N. Singer rev. 4th ed. 1984) 4, 26

"The Top 300 Banks in the United States," Am. Banker, Mar. 15, 1985, at 44 12

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BRIEF OF THE CONFERENCE OF STATE BANK SUPERVISORS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

INTEREST OF *AMICUS CURIAE*

This brief is filed by the Conference of State Bank Supervisors (the "Conference"), with the consent of all parties,[1] in support of the Respondents. The Conference is the professional association of state government officials responsible for regulating more than 10,000 state-chartered banking institutions, with total assets of approximately $1 trillion, in the 50 states and in Guam, Puerto Rico and the Virgin Islands.[2] As the organizational representative of

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[1] Letters indicating the consent of all parties to the filing of this brief have been filed with the Clerk.

[2] In 1958, the Conference invited state-chartered banks to become "associate members," and there are currently about 5,000 such associate mem-

state banking commissioners, the Conference has a vital interest in the outcome of this case, because Petitioners' challenge, if upheld, would seriously undermine the authority of the states to regulate acquisitions of banks within their respective borders by out-of-state bank holding companies, pursuant to Section 3(d) of the Bank Holding Company Act, 12 U.S.C. §1842(d) (the "Douglas Amendment").

Ten states (including Connecticut and Massachusetts, whose statutes are challenged by Petitioners) have enacted regional interstate banking laws. Numerous other states are considering the adoption of similar statutes. In addition, twelve states have adopted laws which permit acquisitions of in-state banks by out-of-state bank holding companies subject to functional or other non-geographic limitations, and the validity of these laws would also be placed in doubt if Petitioners succeed in their challenge to the constitutionality of the Connecticut and Massachusetts statutes.[3] Because Petitioners' challenge would deprive the states of the broad authority which Congress intended to confer upon them under the Douglas Amendment,[4] the Conference is participating in this case to defend the regulatory jurisdiction of its member commissioners.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners Citicorp, Northeast Bancorp, Inc. ("Northeast") and Union Trust Company ("Union Trust") are challenging the decision below,[5] which upheld the constitutionality of regional interstate banking laws enacted by Connecticut and Massachusetts. Each of the challenged

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bers. Associate members, however, may not vote at meetings of the Conference and therefore do not vote on decisions or policies of the Conference.

[3] *See* notes 83-86, *infra*, and accompanying text.

[4] *See* Argument, Part II(B) and (C), *infra*.

[5] *Northeast Bancorp, Inc.* v. *Board of Governors of Federal Reserve System*, 740 F.2d 203 (2d Cir. 1984) (Pet. App. A21-A33), *cert. granted*, 105 S.Ct. 776 (1985).

statutes provides that an out-of-state bank holding company may acquire an in-state bank if (i) the out-of-state holding company is located in another state within the New England region, and (ii) such other state provides reciprocal privileges to bank holding companies located in the enacting state.[6]

Petitioners argue that the New England regional restriction contained in the challenged statutes discriminates against states outside the region (especially with reference to New York) in violation of the Commerce Clause (U.S. Const. art. I, § 8, cl. 3). In addition, Petitioners maintain that the Connecticut and Massachusetts statutes constitute an interstate "compact" which encroaches upon the supremacy and structure of the federal government in violation of the Compact Clause (U.S. Const. art. I, § 10, cl. 3).

Petitioners' arguments are unsound and should not prevail. The challenged statutes (and state regional banking laws in general) are valid exercises of the authority granted *by Congress* to the states under Section 3(d) of the Bank Holding Company Act ("BHC Act"), popularly known as the Douglas Amendment.[7] The Douglas Amendment, which was enacted as part of the original BHC Act in 1956, prohibits every bank holding company from acquiring a bank located in a state other than the state in which the holding company's principal banking subsidiaries are situated, *unless* such acquisition

> . . . is *specifically authorized* by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. [Emphasis added.]

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[6] 1983 Conn. Pub. Acts 411 (Reg. Sess.), § 2, *as amended by* 1984 Conn. Pub. Acts 329 (Reg. Sess.), § 1; Mass Gen. Laws Ann. ch. 167A, § 2 (West 1971 and Supp. 1984).

[7] The parties do not appear to dispute that regional banking laws are constitutional if they operate within the scope of authority granted to the

The express terms of the Douglas Amendment do not contain *any* limitation that would bar the states from authorizing out-of-state bank holding companies to acquire in-state banks subject to a regional restriction. Nor is any such limitation suggested by the legislative history of the Douglas Amendment. On the contrary, Senator Douglas stated that his Amendment would "permit out-of-State holding companies to acquire banks in other States *only to the degree that State laws expressly permit them*".[8]

Thus, Petitioners are attempting to graft a limitation onto the authority given to the states under the Douglas Amendment when no such limitation appears in either the language or legislative history of the statute. They commit further error by ignoring the basic rule of statutory construction that a law must be construed in accordance with its historical context and policy.[9] Instead, they begin from a hypothetical premise *of their own making—viz.*, that there should be free and unrestrained "interstate banking" in the United States, and, therefore, that the Connecticut and Massachusetts statutes are "protectionist statutes . . . that intentionally discriminat[e] against commerce from excluded states."[10]

Such a premise is contrary to the manner in which Congress has *actually* regulated banking in the United States, both historically and currently. Congess has consistently deferred to *state law* in numerous provisions of the federal

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states under the Douglas Amendment. *See, e.g.*, Brief for Petitioner Citicorp at 15; Brief for Petitioners Northeast and Union Trust at 12; Brief for the Federal Respondent in Opposition to the Petition for Certiorari, at 14.

[8] 102 Cong. Rec. 6858 (1956) (emphasis added).

[9] *See, e.g., Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 388-93 (1970); 2A Sutherland, *Statutes and Statutory Construction*, § 45.10 (N. Singer rev. 4th ed. 1984).

[10] Brief for Citicorp at 11. *See also* Brief for Northeast and Union Trust at 2-3.

statutes governing national banks and bank holding companies.[11] Congressional deference to the states has been most complete in matters involving *banking structure, viz.*, the branching of national banks under the McFadden Act and the interstate expansion of bank holding companies under the Douglas Amendment.

In short, "interstate banking"—in the sense of interstate acquisitions of banks by bank holding companies—does *not* exist in this country *except as permitted by the states* under the Douglas Amendment.[12] Indeed, the business of banking is "unique among major American businesses" in that banks may not operate or be acquired across state lines without state authorization.[13]

In view of the terms and historical context of the Douglas Amendment, it is clear that the Connecticut and Massachusetts laws operate within the scope of authority granted by Congress to the states. Accordingly, these state laws do not

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[11] *See, e.g., Independent Bankers Ass'n of America* v. *Smith*, 534 F.2d 921, 932 (D.C. Cir.), *cert. denied*, 429 U.S. 962 (1976); *Iowa Independent Bankers* v. *Board of Governors of Federal Reserve System*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975) (*"Iowa Independent Bankers"*) at 1291-92, 1296-97.

As the Third Circuit Court of Appeals has said:

> Whatever may be the history of federal-state relations in *other* fields, *regulation of banking has been one of dual control* since the passage of the first National Bank Act in 1863.

National State Bank v. *Long*, 630 F.2d 981, 985 (3d Cir. 1980) (emphasis added).

[12] As described below (*see* notes 50-58, *infra*, and accompanying text), twenty-two states (including Connecticut and Massachusetts) have adopted laws which permit out-of-state bank holding companies, under varying circumstances, to acquire in-state commercial banks. Under the Douglas Amendment, interstate bank acquisitions could *not* occur *without* these state laws. Thus, as the Court below said, 740 F.2d at 208 (Pet. App. A29), "the Massachusetts and Connecticut statutes would appear to promote interstate commerce rather than restrict it."

[13] Ginsburg, "Interstate Banking," 9 Hofstra L. Rev. 1133, 1137, 1167-68 (1981).

violate the Commerce Clause. Moreover, because Congress itself has authorized the states to regulate interstate acquisitions of banks by bank holding companies, the challenged statutes do not intrude upon any area of federal supremacy in violation of the Compact Clause.

ARGUMENT

I. THE FEDERAL GOVERNMENT HAS CONSISTENTLY DEFERRED TO STATE CONTROL OF BANKING STRUCTURE, PARTICULARLY UNDER THE DOUGLAS AMENDMENT

In its seminal decision concerning the authority of the states to regulate branching by national banks under the McFadden Act, 12 U.S.C. § 36, this Court carefully examined the history of banking in the United States leading up to the passage of that Act.[14] After reviewing this history, this Court concluded that, under the McFadden Act, national banks may establish branches " 'only to the extent that State laws permit branch banking.' " [15] The Conference believes that a similar inquiry is appropriate here in evaluating the authority given to the states, under the Douglas Amendment, to regulate a related area of banking structure, *viz.*, the acquisition of banks by out-of-state bank holding companies. As shown below, such an inquiry reveals that, in line with Congress' long-standing determination that *state* regulation of banking structure would ensure a *decentralized* banking system, Congress has deliberately empowered *the states* under the Douglas Amendment, to determine the extent to which out-of-state bank holding companies may acquire banks within their respective borders.

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[14] *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252 (1966) (*"Walker Bank"*), at 256-60.

[15] *Id.* at 261.

A. Federal Deference to State Control of Banking Structure from the Second Bank of the United States through the McFadden Act, as amended in 1933

1. President Jackson's Veto of the Rechartering of the Second Bank of the United States

Prominent among those who supported President Andrew Jackson's veto of the rechartering of the Second Bank of the United States in 1832 were the owners of state banks—both in the East and in the West—who resented the Second Bank's exclusive control over the nation's currency and, thereby, the effective allocation of credit resources. Moreover, state banks were the direct beneficiaries of Jackson's decision in 1833 to remove the federal government's deposits from the Second Bank and place them in selected state banks.[16]

Jackson and his supporters—including Roger B. Taney—viewed the Second Bank as a dangerous center of concentrated financial power which threatened political and social democracy.[17] Accordingly, the fight against the Second Bank led naturally to the state "free banking" movement which began in the late 1830's. As typified by New York's banking law of 1838, "free banking" statutes permitted state banks to be chartered under general rules of incorporation rather than requiring special acts of the legislature. The intent of these state laws was "to encourage the growth of banking, but at the same time . . . to prevent the concentration of banking power." [18]

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[16] R. Hofstadter, *The American Political Tradition* 72-81 (Vintage ed. 1974); A. Schlesinger, Jr., *The Age of Jackson* 74-80, 90-93, 97-102 (1945).

[17] Hofstadter, *supra* note 16, at 74-79; Schlesinger, *supra* note 16, at 89-94, 97-102, 105-10.

[18] Golembe, "Our Remarkable Banking System," 53 U.Va.L.Rev. 1091, 1096 (1967). *See also* Hofstadter, *supra* note 16, at 81-82.

2. The National Bank Act of 1864

Following the expiration of the Second Bank's charter in 1836, the federal government did not again enter the bank chartering field until the Civil War. During the interim period, the states were the exclusive chartering and regulatory authorities for banks. In 1863, responding to problems encountered in financing the war effort, Congress enacted the National Currency Act—replaced by the National Bank Act of 1864—to authorize a system of federally-chartered but privately-owned national banks which would issue a new national paper currency.[19]

The National Bank Act did not give the new national banks any express branching authority, a situation which by the 1920's placed them at a serious competitive disadvantage with state banks in states which permitted branching.[20] Moreover, in 1924 this Court held that national banks were subject to state laws restricting or prohibiting branching by *state* banks.[21] That decision confirmed that, under existing legislation, *state* law effectively governed the nation's banking structure.

3. The McFadden Act and the Banking Act of 1933

In response to the competitive inequality faced by national banks with respect to branching, Congress adopted the McFadden Act of 1927,[22] which authorized national banks to establish branches within the municipality where their main banking facilities were located. However, the McFadden Act provided that national banks could establish such branches *only if permitted by state law.*[23]

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[19] Ginsburg, *supra* note 13, at 1139-41; Golembe, *supra* note 18, at 1094-97.

[20] Ginsburg, *supra* note 13, at 1152-53.

[21] *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924).

[22] Act of Feb. 25, 1927, c. 191, § 7, 44 Stat. 1228, *codified at* 12 U.S.C. § 36.

[23] *Id. See also* S. Rep. No. 473, 69th Cong., 1st Sess. 14 (1926), *quoted in Walker Bank*, 385 U.S. at 258.

During the Depression, the Comptroller of the Currency (the regulator of national banks) and others argued that the McFadden Act should be amended to authorize national banks to branch *regardless of state law.* They contended that smaller rural banks were undercapitalized and should be replaced by branches of larger banks.[24] In accordance with this view, Senator Carter Glass of Virginia introduced a bill in 1932 which would have authorized national banks to establish branches outside their home city (i) at any point within their home state, *"irrespective of State laws,"* and (ii) at any point in *contiguous* states within 50 miles of their main office.[25]

Senator Glass' bill was strongly opposed on the ground that it would deprive the states of their control over banking structure and result in a greater concentration of banking resources.[26] Because of this opposition, the bill was defeated in the House. When Senator Glass introduced a new bill in 1933, it contained a branching provision (adopted as Section 23 of the Banking Act of 1933)[27] which allowed national banks to establish branches only *within* their home state and, even there, *"only to the extent that the State laws permit branch banking."*[28] Thus, the McFadden Act, as amended in 1933, firmly established *state* control over branching by national banks.

B. Congressional Establishment of State Control over Interstate Bank Acquisitions under the Douglas Amendment

1. The House and Senate Committee Proposals for Bank Holding Company Legislation

In the early 1950's, supporters of the decentralized dual banking system became concerned with the growth of multi-

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[24] *See Walker Bank,* 385 U.S. at 259.

[25] S. Rep. No. 584, 72d Cong., 1st Sess. 11, 16 (1932).

[26] *E.g.,* S. Rep. No. 584, 72d Cong., 1st Sess. Part II (1933) (Minority Views) at 3-5.

[27] Act of June 16, 1933, c. 89, § 23, 48 Stat. 189, *codified* at 12 U.S.C. § 36(c) and (d).

[28] 76 Cong. Rec. 2511 (1933), *quoted in Walker Bank,* 385 U.S. at 259.

bank holding companies. In particular, the owners of "independent" unit banks complained that holding companies were evading state branching laws by creating numerous subsidiary banks, both within and across state lines, and then operating such banks in a unitary fashion similar to branches.[29]

In response to these complaints, the House Banking and Currency Committee proposed a bill to control bank holding companies (H.R. 6227), which was passed by the full House in 1955. Section 5(c) of H.R. 6227 would have prohibited bank holding companies from acquiring any additional banks outside their home state, or from making further home state acquisitions except in areas where bank branching was permitted or where holding company acquisitions were authorized by state law.[30]

The Senate Committee on Banking and Currency agreed with the House that a federal law regulating bank holding companies was needed,[31] but took a different approach with respect to bank acquisitions. Instead of adopting an absolute federal prohibition against holding company acquisitions across state lines or within states where branching was not permitted, the Senate Committee's bill (S. 2577)

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[29] *See, e.g., Control and Regulation of Bank Holding Companies: Hearings on S. 2674 before the House Comm. on Banking and Currency*, 84th Cong., 1st Sess. (1955) (*"1955 House Hearings"*) at 153-63 (testimony of W. J. Bryan, president, Independent Bankers Ass'n of America) and 163-73 (testimony of H. J. Harding, president, Independent Bankers Ass'n, 12th Federal Reserve District); *Control of Bank Holding Companies: Hearings on S. 880, S. 2350 and H.R. 6227 before a Subcomm. of the Senate Comm. on Banking and Currency*, 84th Cong., 1st Sess. (1955) (*"1955 Senate Hearings"*) at 104-131 (testimony of Messrs. Bryan and Harding).

[30] H.R. 6227, 84th Cong., 1st Sess., § 5(c) (1955), *reprinted in 1955 Senate Hearings, supra* note 29, at 25. *See also* H.R. Rep. No. 609, 84th Cong., 1st Sess. 15, 24 (1955).

[31] *See* S. Rep. No. 1095, 84th Cong., 1st Sess. (1955), *reprinted in* 1956 U.S. Code Cong. & Ad. News 2482 at 2483.

provided that such acquisitions would be allowed, subject to prior Federal Reserve Board approval.[32]

2. Congressional Adoption of the Douglas Amendment

With respect to interstate acquisitions of banks by bank holding companies, the American Bankers Association ("ABA") did not favor either the House bill or the Senate Committee bill. Instead, the ABA proposed a compromise which would establish a general federal prohibition against such acquisitions but would *also* allow *each State* to lift such prohibition and allow one or more out-of-state bank holding companies to acquire in-state banks.[33]

The ABA compromise position was similar to a floor amendment proposed by Senator Paul Douglas of Illinois during the Senate debates on S. 2577.[34] Senator Douglas' amendment, which was enacted as Section 3(d) of the original BHC Act of 1956, provided that no bank holding company could acquire a bank located in a state other than the state in which the holding company's principal place of business was situated or its "principal operations" were conducted, *unless* such acquisition was "specifically authorized" by the statutory law of such other state.[35]

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[32] *Id.* at 2489-93. The Senate Committee also contemplated that states could *affirmatively prohibit* acquisitions of banks by bank holding companies, either within or across state lines, under Section 7 of S. 2577, which was adopted as Section 7 of the BHC Act. *See* 102 Cong. Rec. 6751-53 (remarks of Senator Robertson, chief sponsor and floor manager of S. 2577); *id.* at 6855 (remarks of Senators Robertson and Capehart).

[33] *1955 House Hearings, supra,* note 29, at 406 (testimony of G. R. Boyles on behalf of the ABA); *1955 Senate Hearings, supra* note 29, at 289 (supplemental statement of Mr. Boyles on behalf of the ABA).

[34] See 102 Cong. Rec. 6860 (1956). The Senate debates on the Douglas Amendment are set forth *id.* at 6760-61, 6856-63. Senator Douglas had previously offered his amendment before the Senate Committee, but it was defeated by a vote of 6-4. *Id.* at 6760, 6862.

[35] *Id.* at 6857. The Douglas Amendment was supported by both the ABA and the independent bankers. *Id.* at 6760 (remarks of Senator Robertson); 6860 (remarks of Senator Douglas).

Senator Douglas declared that his amendment would carry out the long-established federal policy against the undue concentration of financial resources, in order to ensure both political liberty and economic competition:

> [S. 2577], and [our] amendment . . . , are in the true American tradition, for what the sponsors of the amendment are seeking to do is to prevent an undue concentration of banking and financial power, and instead to keep the private control of credit diffused as much as possible.
>
> . . . .
>
> Andrew Jackson realized all this when he faced Nicholas Biddle and the Second Bank of the United States. . . . [Jackson] wanted credit and banking to be decentralized and diffused so that men might be free.[36]

Senator Douglas pointed out that where banking resources had become concentrated in a few giant banks—as in Canada, Great Britain and Germany—competition had diminished and industry had become concentrated. Therefore, he argued, S. 2577 and his amendment were needed to "check and, if possible, to roll back the concentration of banking and credit" in the United States.[37]

Senator Douglas also emphasized that his amendment would prevent bank holding companies from evading *state* limitations on bank expansion:

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[36] 102 Cong. Rec. 6857 (1956).

[37] *Id. See also id.* at 6861-62 (statement by Senator Payne and remarks by Senator Morse). In part because of the Douglas Amendment, the American banking industry is highly decentralized, with a large number of banks of varying sizes, designed to serve the needs of both urban and rural communities and small as well as large businesses. As of December 31, 1983, there were 14,890 commercial banks in the United States, including 4,751 national banks and 10,139 state banks. Federal Deposit Ins. Corp., *Changes among Operating Banks and Branches, 1983*, at 4 (1984). Even among the largest 300 U.S. commercial banks, the total deposits held by each bank, as of December 31, 1984, ranged from $757 million (Summit Bank, Fort Wayne, Ind.) to over $79 billion (Citibank) and over $88 billion (Bank of America). "The Top 300 Banks in the United States," Am. Banker, Mar. 15, 1985, at 44.

> [O]ur amendment aims . . . to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act—namely, *our amendment will permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them;* and that is the provision of the McFadden Act.
>
> . . . .
>
> [Our amendment] is a logical continuation of the principles of the McFadden Act, which tried to prevent the Federal power from being used to permit national banks to expand across State lines in a way contrary to State policy . . . .[38]

Certain Senators *opposed* the Douglas Amendment because it would result in discrimination against interstate commerce. For example, Senator Bennett of Utah argued that the Amendment would

> . . . require every State that does not now have legislation prohibiting bank holding companies to *discriminate* in favor of such corporations that may be resident in their State and against bank holding companies resident in any other State and requires affirmative legislation to remove the *discrimination.*[39]

Senator Bennett further contended that "[f]or Congress to *require discrimination in interstate commerce,* and then leave it to *the several States to correct it,* is a strange approach".[40] Nevertheless, his arguments were *rejected* and the Douglas Amendment was adopted by an overwhelming 58-18 vote of the Senate,[41] and received House approval.[42]

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[38] *Id.* at 6858 (emphasis added), 6860.

[39] *Id.* at 6860 (emphasis added). *See also id.* at 6862 (remarks of Senator Bricker).

[40] *Id.* at 6860 (emphasis added).

[41] *Id.* at 6863. In addition, of the nine absent and nonvoting Senators who indicated their views on the Douglas Amendment, seven supported the Amendment. *Id.*

[42] *Id.* at 7165.

C. Subsequent Congressional Reaffirmations of State Authority under the Douglas Amendment

On several occasions since 1956, Congress has reconsidered the policy on interstate bank acquisitions set forth in the Douglas Amendment. In each instance, Congress has *confirmed* the states' authority to control the extent to which bank holding companies may acquire banks across state lines, and Congress has also *rejected* proposals to rescind or substantially modify the Douglas Amendment.

In 1966, Congress modified the Douglas Amendment by providing that the "home state" of each bank holding company would be the state in which its operations are "principally conducted" (defined as the state in which the total deposits of the holding company's banking subsidiaries are the largest). The 1966 amendment removed the previous alternative reference to the "principal office and place of business" of a bank holding company.[43] It thereby precluded the possibility that a holding company might establish its principal office in one state and its principal operations in another, and then claim that it had *two* "home states" in which it could acquire banks without state approval.[44] Thus, the 1966 amendment reiterated Congress' intent to prohibit bank holding companies from acquiring banks in more than one state without state permission.

Congress again considered the regulation of bank expansion under the McFadden Act and the Douglas Amendment when it adopted the International Banking Act of 1978 ("IBA").[45] Under Section 14 of the IBA, Congress directed President Carter to submit recommendations to Congress

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[43] Act of July 1, 1966, Pub. L. No. 89-485, § 7(d), 80 Stat. 237.

[44] *See* S. Rep. No. 1179, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. Code Cong. & Ad. News 2385 at 2393.

[45] Act of Sept. 17, 1978, Pub. L. No. 95-369, 92 Stat. 607. *See* S. Rep. No. 1073, 95th Cong., 2d Sess. 6-12 (1978).

"with regard to the applicability of the McFadden Act to the current banking structure."[46]

President Carter's report to Congress recommended sweeping changes in the Douglas Amendment (as well as proposed amendments to the McFadden Act) which would have *removed* most state authority to regulate interstate acquisitions of banks by bank holding companies.[47] However, Congress has adopted *only* the *most limited* proposal of the report—*viz.*, the authorization of interstate acquisitions of large failed banks without state approval—and only for a period of three years ending October 15, 1985.[48] Moreover, this limited authorization contains several conditions designed to *preserve* a substantial degree of *state* determination over acquisitions of failed banks.[49] In

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[46] *Id.* at 19.

[47] *Geographic Restrictions on Commercial Banking in the United States: The Report of the President* (Treas. Dept. 1981). The Report recommended three substantial modifications of the Douglas Amendment and the McFadden Act; (i) that interstate acquisitions of banks by bank holding companies be permitted *regardless of state law* (although at first only on a regional basis); (ii) that, over time, national banks should be permitted, *without* state approval, to deploy EFT (electronic funds transfer) terminals nationwide and to establish interstate brick-and-mortar branches within "natural market areas" (*e.g.*, metropolitan areas); and (iii) that interstate acquisitions of "failing banks" by bank holding companies should be allowed without state permission. *Id.* at 17-20.

[48] Section 116 of the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 116, 96 Stat. 1476, *codified at* 12 U.S.C. § 1823 (f), authorizes the Federal Deposit Insurance Corporation ("FDIC") to approve, without state permission, the acquisition of a failed bank having total assets of $500 million or more by an out-of-state bank holding company.

[49] In evaluating bids by bank holding companies for a failed bank, the FDIC must give priority to bidders located within the *same* state as the bank, or (if an out-of-state bidder is to be chosen) to bidders located in *adjacent* states. In addition, if the responsible state bank supervisor objects to such an acquisition, the FDIC may approve the acquisition only by a unanimous vote of its Board of Directors. *See* S. Rep. No. 536, 97th Cong., 2d Sess. 5-6, 47 (1982), *reprinted in* 1982 U.S. Code Cong. & Ad.

short, Congress has *refused* to deprive the states of the broad authority conferred upon them under the Douglas Amendment.

D. The States Have Enacted Numerous Statutes pursuant to the Douglas Amendment, and These Statutes Have Been Upheld by the Federal Reserve Board

Beginning in 1972, 22 states have adopted statutes pursuant to the Douglas Amendment which permit varying degrees of entry by out-of-state bank holding companies. Four states (beginning with Iowa in 1972) have enacted "grandfather" statutes, which permit bank acquisitions only by out-of-state bank holding companies which had a specified type of presence in the state on a stipulated date.[50]

In addition, beginning in 1980, six states have adopted "limited purpose" interstate banking laws. These laws generally permit an out-of-state bank holding company to acquire a single in-state bank to carry on a limited type of business (usually the issuance of credit cards). Such statutes also may require the limited-purpose bank to employ a minimum number of state residents and to operate at a single location in a manner which does not attract customers of local banks.[51] In addition, four states have authorized out-of-state bank holding companies to acquire failed commercial banks subject to specified conditions.[52]

News 3054 at 3059-60, 3101; S. Rep. No. 641, 97th Cong., 2d Sess. 85-86 (1982) (Conf. Rep.), *reprinted in* 1982 U.S. Code Cong. & Ad. News 3128 at 3128-29.

[50] Fla. Stat. Ann. § 658.29(3)(d); Ill. Rev. Stat. ch. 17, § 2510; Iowa Code Ann. § 524.1805; Neb. Rev. Stat. § 8-903 (Supp. 1983); Utah Code Ann. § 7-3-2(4) (Supp. 1984).

[51] Del. Code Ann. tit. 5, § 803; Md. Fin. Inst. Code Ann. §§ 5-901 to 5-908; Neb. Rev. Stat. § 8-1512 (Supp. 1983 and 1984); Nev. Rev. Stat. ch. 666.132 (Cum. Supp. 1984); S.D. Codified Laws Ann. §§ 51-16-40 through 51-16-47 (Supp. 1984); Va. Code §§ 6.1-390 through 6.1-397.

[52] Ill. Rev. Stat. ch. 17, § 2508 (Supp. 1984-85); 1985 Ore. Laws ch. 12; Utah Code Ann. § 7-19-1 (Supp. 1984); Wash. Rev. Code Ann. §30.04.230 (Supp. 1985).

Two states—Alaska and Maine—permit acquisitions of in-state banks by any out-of-state bank holding company, but impose certain conditions on such acquisitions.[53] Similarly, New York does not allow an out-of-state bank holding company to acquire a New York bank *unless* that holding company's home state provides *reciprocal* privileges to New York bank holding companies.[54]

On December 30, 1982, Massachusetts adopted the first regional interstate banking law.[55] In 1983, Connecticut and Rhode Island enacted laws similar to the Massachusetts statute, although the regional limitation in the Rhode Island statute expires on July 1, 1986.[56] Four Southeastern states have subsequently adopted laws authorizing interstate acquisitions within the Southeastern region.[57] Kentucky, Oregon and Utah have also enacted interstate laws with regional limitations.[58] Approximately twenty other states and the District of Columbia are likely to consider regional banking legislation in 1985.[59]

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[53] Maine imposes minimum capitalization requirements on banks which are acquired by out-of-state holding companies and requires such an acquisition to bring "net new funds" into Maine. Alaska permits out-of-state holding companies to acquire only banks which were established prior to July 1, 1982. Me. Rev. Stat. Ann. tit. 9B, § 1013 (Supp. 1984); Alaska Stat. § 06.05.235.

[54] N.Y. Banking Law § 142-b (McKinney Supp. 1983).

[55] Mass. Gen. Laws Ann. ch. 167A, § 2 (West 1971 and Supp. 1984).

[56] 1983 Conn. Pub. Acts 411 (Reg. Sess.), § 2, as amended by 1984 Conn Pub. Acts 329 (Reg. Sess.), § 1; R.I. Gen. Laws §§ 19-30-1 and 19-30-2 (Supp. 1983).

[57] Fla. Stat. Ann. § 658.295 (West Supp. 1984), Ga. Code § 7-1-620, *et seq.* (Supp. 1984), N.C. Gen. Stat. §§ 53-209 to 53-218 (Interim Supp. (1984); S.C. Code tit. 34, ch. 24 (Supp. 1985). These statutes are not identical. For example, the Georgia law does not include Arkansas, Maryland, West Virginia and the District of Columbia within the defined region for reciprocal acquisitions.

[58] Ky. Rev. Stat. § 287-900, *et seq.* (Cum. Supp. 1984); 1985 Ore Laws ch. 12; Utah Code Ann. §§ 7-1-102 and 7-1-702 (Supp. 1984).

[59] *See* Sudo, "Interstate Bills Dominate State Slates in '85," Am. Banker, Dec. 28, 1984, at 1, col. 2.

The Federal Reserve Board has consistently given effect to state-adopted interstate banking laws with "grandfather,"[60] "limited purpose,"[61] and "failed bank" limitations.[62] Moreover, in a series of three decisions upheld by the Court below, the Board approved acquisitions pursuant to the Connecticut and Massachusetts statutes.[63] The Board's assessment of the validity under the Douglas Amendment of state-adopted interstate banking laws, including regional banking laws, is entitled to the "greatest deference" in view of the Board's primary responsibility for interpreting and applying the BHC Act.[64]

II. STATE REGIONAL BANKING LAWS ARE AUTHORIZED BY THE DOUGLAS AMENDMENT AND THEREFORE DO NOT VIOLATE THE COMMERCE CLAUSE

This Court held in *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980), that the Commerce Clause applies

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[60] *E.g., Northwest Bancorporation*, 38 Fed. Reg. 21530 (1973), *aff'd sub nom. Iowa Independent Bankers, supra* note 11 (Iowa law); *NCNB Corp.*, 68 Fed. Res. Bull. 54 (1982) (Florida law).

[61] *E.g., Citicorp*, 67 Fed. Res. Bull. 181 (1981) (South Dakota law); *Citicorp*, 71 Fed. Res. Bull. 101 (1985) (Nevada law).

[62] *E.g., BankAmerica Corp.*, 69 Fed. Res. Bull. 568 (1983) (Washington law).

[63] *Bank of New England Corp.*, 70 Fed. Res. Bull. 374 (1984); *Hartford National Corp.*, 70 Fed. Res. Bull. 353 (1984); *Bank of Boston Corp.*, 70 Fed. Res. Bull. 524 (1984). *See* Pet. App. A34-A86. Since the decision below, the Board has approved further acquisitions under the Rhode Island, Florida and Georgia statutes. *E.g., Hartford National Corp.*, 71 Fed. Res. Bull. 43 (1985); *SunTrust Banks, Inc.*, 71 Fed. Res. Bull. 176 (1985).

The Board also *denied* an application by Bank of New York Company, Inc., a New York bank holding company, to acquire Petitioner Northeast, a Connecticut bank holding company, in violation of the regional limitation contained in the Connecticut statute. *Bank of New York Co.*, 70 Fed. Res. Bull. 527 (1984).

[64] *E.g., Board of Governors of Federal Reserve System* v. *Investment Co. Institute*, 450 U.S. 46, 56-57 (1981); *Board of Governors of Federal Reserve System* v. *First Lincolnwood Corp.*, 439 U.S. 234, 251 (1978).

to state regulation of nonbanking financially-related services provided by bank holding companies. However, the Court also pointed out that Congress may "confe[r] upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Id.* at 44. In this case, it is clear from both the terms and legislative history of the Douglas Amendment that Congress *has* authorized the states to adopt regional banking laws. Accordingly, such laws do not violate the Commerce Clause.

A. Petitioners' Argument that the States Must Show "Specific" Congressional Authorization for Regional Banking Laws Is Contrary to the Decisions of this Court

Petitioners claim that the Douglas Amendment does not represent "specific Congressional authorization for . . . concerted, discriminatory state statutes." They argue that Congress must have "deliberately and specifically authorized the *particular* deviation from the constitutional mandate" which is at issue, and that "the Douglas Amendment says nothing about groups of states joining together to discriminate against commerce deriving from disfavored sister states." [65]

Petitioners' analysis is directly contrary to the approach taken by this Court in determining whether Congress has authorized the states to regulate an area of interstate commerce. This Court has said that Congress must "affirmatively contemplate" state regulation of interstate commerce in order to immunize it from scrutiny under the Commerce Clause.[66] However, rather than requiring "specific" authorization for each "particular [state] deviation" from the Commerce Clause—as Petitioners argue—

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[65] Brief for Citicorp at 18, 22-23 (emphasis added). *See also* Brief for Northeast and Union Trust at 22-23, 26.

[66] *South-Central Timber Development, Inc.* v. *Wunnicke*, 104 S. Ct. 2237, 2242 (1984).

this Court has held that if Congress *generally* authorizes the states to regulate a defined field of commerce, *all* state regulation pursuant to such authority is valid under the Commerce Clause:

> If Congress ordains that the States may freely regulate an aspect of interstate commerce, *any action taken by a state within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge.*[67]

In *Western & Southern Life,* as well as its earlier decision in *Prudential Insurance Co.* v. *Benjamin,*[68] this Court determined that "Congress removed all Commerce Clause limitations on the authority of the states to regulate and tax the business of insurance when it passed the McCarran-Ferguson Act."[69] This Court particularly relied upon Section 2(a) of the McCarran-Ferguson Act, which declares: "The business of insurance shall . . . be subject to the laws of the several states which relate to the regulation or taxation of such business." The Court noted that the "unequivocal language of the Act suggests no exceptions,"[70] and pointed out that Congress had adopted the statute against the background of extensive *state* regulation of insurance:

> [I]n taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation [of insurance] . . . . [I]ts purpose was evidently to throw the whole weight of its power behind the state systems . . . .[71]

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[67] *Western & Southern Life Ins. Co.* v. *State Board of Equalization,* 451 U.S. 648 (1981) (*"Western & Southern Life"*) at 652-53 (emphasis added).

[68] 328 U.S. 408 (1946) (*"Prudential"*).

[69] *Western & Southern Life,* 451 U.S. at 653. *See also Prudential,* 328 U.S. at 430, 436.

[70] *Western & Southern Life,* 451 U.S. at 653.

[71] *Prudential,* 328 U.S. at 430. *See also Western & Southern Life,* 451 U.S. at 654.

In view of the broad authority granted to the states under the McCarran-Ferguson Act, this Court *rejected* the contention that the Commerce Clause prevented states from imposing "anti-competitive state taxation that discriminates against out-of-state insurers." The Court found "no such limitation in the language or history of the Act." [72]

Significantly, the decisions in *Western & Southern Life* and *Prudential* were *not* based upon a finding that the McCarran-Ferguson Act *specifically* authorized the states to impose *discriminatory* taxes upon out-of-state insurance companies. This Court instead found that Congress had *generally* authorized the states to regulate and tax the business of insurance. Accordingly, those decisions contradict Petitioners' claim that state regional banking laws must have been "specifically" contemplated by the Douglas Amendment.

B. Congress Has Granted to the States an Unqualified Power to Regulate Interstate Bank Acquisitions under the Douglas Amendment

Western & Southern Life and *Prudential* are directly applicable here. In a manner similar to the McCarran-Ferguson Act, the Douglas Amendment grants to the states an unqualified power to regulate interstate acquisitions of banks by bank holding companies, since any such acquisition is prohibited by *federal* law *unless* it is "specifically authorized by the statute laws of the State in which such bank is located." It would be difficult to conceive of a more

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[72] *Id.* at 653. *Prudential* upheld a South Carolina tax which applied *only* to *out-of-state* insurance companies, and *Western & Southern Life* sustained a California "retaliatory tax" which was assessed against insurance companies from *other* states which imposed taxes higher than those of California.

explicit and unconditional grant of authority by Congress to the states.[73]

Moreover, as in the case of the McCarran-Ferguson Act, there is no indication that Congress has limited the authority granted to the states under the Douglas Amendment. In *BT Investment,* this Court said that the Douglas Amendment grants to the states "authority to create exceptions . . . [which] *permit* expansion of banking across state lines where it otherwise would be federally prohibited."[74] This Court did not indicate any limitation on the authority of states to create such "exceptions." In fact, while the Court held that *Section 7* of the BHC Act authorizes the states to enact statutes only "within the boundaries marked by the Commerce Clause" (447 U.S. at 49), it stated *no* such view with respect to the *Douglas Amendment,* which is contained in *Section 3(d)* of the Act.

As shown above in Part I(B)(2), the legislative history of the Douglas Amendment confirms that Congress intended to provide the states with broad authority to determine the extent to which interstate bank acquisitions may occur. Senator Douglas stated that his Amendment would permit out-of-state holding companies to acquire banks in other states "*only to the degree that State laws*

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[73] In contrast, the cases relied upon by Petitioners involved federal statutes which did *not* contain any similar delegation of power to the states. In *Wunnicke,* 104 S. Ct. at 2240-43, the federal statutes in question dealt only with timber cut from *federal* lands and did *not* apply to *state* lands. In *New England Power Co.* v. *New Hampshire,* 455 U.S. 331 (1982) (*"New England Power"*), at 340-43, the federal statute contained only "a standard 'nonpre-emption' clause" which granted no additional authority to the states. Finally, each of the federal statutes involved in *Sporhase* v. *Nebraska,* 458 U.S. 941, 958-60 (1982), contained only a similar nonpreemption clause and a provision stating that water rights arising in connection with *federal* projects would be governed by state law. The latter provision was not relevant to the state reciprocity restriction on exportation of water which was at issue in *Sporhase.*

[74] 447 U.S. at 47 (emphasis in original).

expressly permit them." [75] Similarly, Senator Robertson, the chief sponsor of the BHC Act, acknowledged (while opposing the provision) that, under the Douglas Amendment, "no bank holding company in the future may cross a State line *unless the laws of the State involved permit it to so.*" [76]

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[75] 102 Cong. Rec. 6858 (1956) (emphasis added). Petitioners argue that Senator Douglas' remarks are unreliable "isolated fragments" of legislative history. Brief for Petitioner Citicorp at 27, and Brief for Petitioners Northeast and Union Trust at 26, *quoting New England Power*, 455 U.S. at 342.

New England Power, however, involved only the brief floor remarks of a *single* Congressman. In contrast, the Senate's discussion of the Douglas Amendment covers more than eight pages of the *Congressional Record* (102 Cong. Rec. 6760-61 and 6856-63), and every Senator who described the legal effect of the Douglas Amendment concurred with Senator Douglas' description. *See* 102 Cong. Rec. at 6760 (remarks of Senator Robertson), 6860 (remarks of Senator Bennett), 6861 (remarks of Senator Bricker), and 6862 (statement of Senator Payne). These extended and consistent statements cannot be dismissed as "isolated fragments" of legislative history.

Petitioners also quote *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979), for the proposition that "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." Brief for Petitioner Citicorp at 27; Brief for Petitioners Northeast and Union Trust at 26 n.23. *Chrysler Corp.* explained that "[the sponsor's] statement must be considered with the Reports of both Houses and the statements of other Congressmen" (441 U.S. at 311). However, *unlike* the 1958 amendment to 5 U.S.C. § 301, which was considered in *Brown*, the Douglas Amendment was *not* included in a House or Senate committee bill (*see* Part I(B), *supra*), and there are no committee reports to consider in this case. Therefore, Senator Douglas' remarks are "an authoritative guide to the statute's construction," *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 526-27 (1982), and gain further significance in view of their consistency with the statements of other Senators who both supported *and* opposed the Douglas Amendment. *FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564-66 (1976); *Hilton* v. *Sullivan*, 334 U.S. 323, 338-39 (1948).

[76] 102 Cong. Rec. 6760 (1956) (emphasis added).

Senator Douglas pointed to the McFadden Act as the model for his Amendment.[77] As described above in Part I(A)(3), the McFadden Act authorizes national banks to establish branches " 'only to the extent that the State laws permit branch banking.' " *Walker Bank*, 385 U.S. at 261. Under the McFadden Act, the states may regulate the *method* by which national banks establish branches,[78] or may place *geographical limitations* on branching.[79] Senator Douglas noted that, in 1956, New York was divided by state branching law into ten geographic zones, and that state and national banks could not branch outside the zone where their home offices were located. 102 Cong. Rec. 6858 (1956). Thus, Senator Douglas' statement that his Amendment would embody "the principles of the McFadden Act" (*id.* at 6860) plainly indicates that the states may place *geographical and other limitations* on acquisitions of banks by out-of-state bank holding companies.

Senator Douglas' remarks strongly suggest that the states would have authority to be "selective" in admitting out-of-state bank holding companies.[80] In fact, certain Senators *opposed* the Douglas Amendment on the ground that it would mandate "discrimination" in interstate com-

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[77] 102 Cong. Rec. 6858, 6860 (1956).

[78] *E.g., Walker Bank*, 385 U.S. at 261-62 (state law permitting branching only by merger with an existing bank).

[79] *E.g., First Union Bank & Trust Co.* v. *Heimann*, 600 F.2d 91, 94 96-99 (7th Cir. 1979) (state law prohibiting branching *except* in a city or town where no other bank is located); *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537, 539-41 (6th Cir.), *cert. denied*, 358 U.S. 830 (1958) (state law prohibiting branching in a city or village in which another bank has its main office or a branch).

[80] *Iowa Independent Bankers*, 511 F.2d at 1296. *See* 102 Cong. Rec. at 6860, 6862 (remarks of Senators Douglas and Payne).

In *Conference of State Bank Supervisors* v. *Conover*, 715 F.2d 604, 613, 615 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 1708 (1984), the District of Columbia Circuit reviewed its decision in *Iowa Independent Bankers* and reaffirmed its holding that "the Douglas Amendment empowered states *to discriminate among out-of-state bank holding companies* when deciding which could enter" (emphasis added).

merce.[81] Thus, Congress clearly understood that the Douglas Amendment would empower the states to regulate interstate bank acquisitions without regard to Commerce Clause limitations.[82]

C. Petitioners' Interpretation Is Contrary to the Intent of the Douglas Amendment.

In contrast to the broad state authority indicated by the terms and legislative history of the Douglas Amendment, Petitioners would severely restrict the ability of states to regulate interstate acquisitions of banks by bank holding companies. Petitioners argue that the Douglas Amendment does *not* make state laws enacted thereunder "immune from the Commerce Clause."[83] If this position were correct, it would create substantial doubt as to the validity of *all* of the state-enacted interstate banking laws discussed above in Part I(D), because *none* of those laws permits out-of-state holding companies to acquire in-state banks on the same basis as in-state holding companies.[84] Petitioner Citicorp seeks to distinguish state regional banking laws from other state laws which place reciprocal or functional restrictions on bank acquisitions by out-of-state holding companies,[85] but these latter statutes are *also* of doubtful validity if the Douglas Amendment does *not* protect them from scrutiny under the Commerce Clause.[86]

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[81] *See* notes 39-42, *supra*, and accompanying text.

[82] *See National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458-61 (1974); *Hilton* v. *Sullivan*, 334 U.S. at 339.

[83] Brief for Citicorp at 21. *See also* Brief for Northeast and Union Trust at 22.

[84] *See BT Investment*, 447 U.S. at 36-37.

[85] Brief for Petitioner Citicorp at 37.

[86] *See* Brief for the Federal Respondent, *supra* note 7, at 13-14 n.18. *See also, e.g., Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366 (1976) (state law placing reciprocity condition on importation of out-of-

Petitioners' narrow interpretation of the Douglas Amendment is contrary to the broad construction adopted in *Iowa Independent Bankers,* where the District of Columbia Circuit said:

> [T]he intent of the Douglas Amendment was to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion would not contravene state policy.[87]

Moreover, Petitioners' interpretation is contrary to the *general* federal policy in favor of *state* determination of banking structure.[88] As in the case of the insurance business, Congress has acted with "full knowledge" of the differing state systems for regulating banking structure, and has "throw[n] the whole weight of its power behind the state systems." *Prudential,* 328 U.S. at 430. Accordingly, state regional banking laws fall within the scope of authority conferred by Congress and do not violate the Commerce Clause.

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state milk violated Commerce Clause); *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525 (1949) (state order prohibiting establishment of in-state milk plant by out-of-state corporation, on ground that proposed plant would divert customers from existing in-state plants, was contrary to the Commerce Clauses).

[87] 511 F.2d at 1297. Similarly, in *Bank of New York,* 70 Fed. Res. Bull. at 528, the Federal Reserve Board pointed to "the Congressional intent underlying the Douglas Amendment of allowing the states to apply their own policies regarding interestate banking".

[88] The only exception to this federal policy is 12 U.S.C. § 1823(f), which authorizes, under carefully defined circumstances, acquisitions of failed banks by out-of-state bank holding companies without state permission. *See* notes 48-49, *supra,* and accompanying text. The fact that Congress has created this *express* and *carefully limited* exception to state authority under the Douglas Amendment seriously undermines the effort of Petitioners to create an additional *implied* exception to state authority thereunder. *See Andrus* v. *Glover Construction Co.,* 446 U.S. 608, 616-17 (1980); Sutherland, *Statutes and Statutory Construction, supra* note 9, at § 47.11.

III. STATE REGIONAL BANKING LAWS DO NOT VIOLATE THE COMPACT CLAUSE

Petitioners contend that the challenged statutes constitute a "compact" which "inflicts substantial injury on all excluded states" and "impermissibly disrupts the balance of power between the states and the Federal Government" in the regulation of banking.[89] Because Congress has not specifically consented to these state laws, Petitioners claim that they violate the Compact Clause.

Petitioners' analysis is erroneous for several reasons. First, it does not appear that the challenged statutes represent a "compact." Despite Petitioners' arguments with respect to consultations among Connecticut and Massachusetts legislators,[90] the fact remains that each of the statutes was enacted *independently*. Unlike other cases in which the Court has found a "compact," the New England statutes do *not* embody a formal agreement between states,[91] or create powers which (i) may be exercised by an authority *separate* from each enacting state and (ii) are conditioned upon the acceptance of *other* states.[92]

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[89] Brief for Citicorp at 14. *See also* Brief for Petitioners Northeast and Union Trust at 33.

[90] Brief for Petitioner Citicorp at 5-6, 39-40; Brief for Petitioners Northeast and Union Trust at 32. Although the Federal Reserve Board said that the Connecticut and Massachusetts statutes "can be considered as part of an implicit compact or agreement," the Board did *not* rely upon any finding of an *actual* compact. *Bank of New England*, 70 Fed. Res. Bull. at 380, Pet. App. A52.

[91] *Compare, e.g., New Hampshire* v. *Maine*, 426 U.S. 363 (1976) (consent decree locating boundary line); *Virginia* v. *Tennessee*, 148 U.S. 503 (1893) (agreement fixing boundary line).

[92] *Compare, e.g., United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978) (*"Multistate Tax Commission"*) at 491-93 (White, J., dissenting) (agreement creating multistate Commission which had power, *e.g.*, to conduct audits and issue subpoenas, and whose existence was conditioned upon the approval of at least *seven* states).

Second, even assuming *arguendo* that the challenged statutes are based upon an implicit agreement, this Court has held that reciprocal state laws do *not* create a "compact" requiring congressional consent *unless* they result in an "enhancement of state power at the expense of the federal supremacy".[93] As stated in *Multistate Tax Commission*, "the test [under the Compact Clause] is whether the Compact enhances state power *quoad* the National Government." 434 U.S. at 473.

In this case, there is no such "enhancement" of state power, because the challenged statutes do *not* authorize the states to exercise any powers *collectively* which each state could not exercise *separately* under the Douglas Amendment. *See id.* at 474-75.[94] As shown above, under the

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[93] *Multistate Tax Commission*, 434 U.S. at 469-71. *See also New York* v. *O'Neill*, 359 U.S. 1 (1959); *Bode* v. *Barrett*, 344 U.S. 583, 586 (1953).

[94] Petitioners argue that Congress' failure in 1984 to approve bills which would have specifically authorized state regional banking laws shows that Congress has not "consented" to such laws (*e.g.*, Brief for Citicorp at 7, 47). However, Petitioners' reliance on such legislative history is unavailing for two reasons. First, this Court's decision in *Multistate Tax Commission* was *not* affected by the fact that Congress had failed to pass any of *twelve* bills introduced to provide specific authorization for the challenged Commission. *See* 434 U.S. at 458 n.8, 486 (White, J., dissenting).

Second, in 1984 the Senate *did* pass a bill (S. 2851, 98th Cong., 2d Sess., § 903), by a vote of 89-5, which would have specifically authorized state regional banking laws. 130 Cong. Rec. S 11162, S 11178 (daily ed. Sept. 13, 1984). Significantly, Senator Garn, the chief sponsor and floor manager of the bill, stated that the provision was "merely a clarification of the powers that the states have always retained under the Douglas amendment," and was fully in accord with the interpretation of the Douglas Amendment by the Court below. *Id.* at S 11153; *see also id.* (remarks of Senator Tsongas). Thus, the only chamber of Congress which actually considered the issue in 1984 overwhelmingly *affirmed* the *existing* authority of states to enact regional banking laws. *Compare* 130 Cong. Rec. H 10005 (daily ed. Sept. 24, 1984) (remarks of Rep. St Germain concerning *absence* of House hearings or debates on regional banking and other provisions of Senate bill).

Douglas Amendment Congress has authorized *each state* to adopt legislation which permits out-of-state bank holding companies to acquire in-state banks subject to geographical and other limitations. In view of this congressional authorization, state regional banking laws do not encroach upon "federal supremacy" in violation of the Compact Clause.[95]

Finally, the challenged statutes do not injure non-New England states in any manner which violates the Compact Clause. This Court acknowledged in *Multistate Tax Commission* that regulatory actions by particular states may place "economic pressure" on other states, but nevertheless held:

> Unless that pressure transgresses the bounds of the Commerce Clause or the Privileges and Immunities Clause of Art. IV, § 2, . . . it is not clear how our federal structure is implicated.[96]

As shown above in Part II, state regional banking laws do *not* violate the Commerce Clause. In addition, corporations such as Petitioners are *not* protected by the Privileges and Immunities Clause.[97] Therefore, Petitioners have *not* demonstrated that the challenged statutes have any impact upon other states which is forbidden by the Compact Clause.

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[95] *See Multistate Tax Commission*, 434 U.S. at 471-72. Despite Petitioners' claim that there is a "vital federal interest" in interstate banking (*e.g.*, Brief for Citicorp at 45), this Court has held that a "federal interest" is *not* sufficient to implicate the Compact Clause. Only a collective state encroachment upon "federal *supremacy*" will violate the Compact Clause. *Id.* at 479-80 n.33 (emphasis added). Moreover, both the Court below and the Federal Reserve Board concluded that the Douglas Amendment represents a "*renunciation of federal interest* in regulating the interstate acquisition of banks by bank holding companies." 740 F.2d at 207 (Pet. App. A29), *quoting Bank of New England*, 70 Fed. Res. Bull. at 380 (Pet. App. A52) (emphasis added).

[96] *Multistate Tax Commission*, 434 U.S. at 478 (citation omitted).

[97] *Western & Southern Life*, 451 U.S. at 656.

CONCLUSION

For the reasons set forth above, *amicus curiae* Conference of State Bank Supervisors respectfully requests that this Court affirm the decision below.

Respectfully submitted,

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